No. 1011 88

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

ELLA F. FONDREN AND THE ESTATE OF W. W. FONDREN, DECEASED,
ELLA F. FONDREN, INDEPENDENT EXECUTRIX,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

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SUBJECT INDEX

PETITION FOR WRIT OF CERTIORARI

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

LIST OF AUTHORITIES

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PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Ella F. Fondren and the Estate of W. W. Fondren, deceased, Ella F. Fondren, Independent Executrix, by their attorneys E. E. Townes and W. M. Cleaves, pray that a Writ of Certiorari issue to review the decision of the United States Circuit Court of Appeals for the Fifth Cir-

cuit, entered March 3, 1944, in Case No. 10829 below, affirming the judgment of The Tax Court of the United States in the above entitled case (same being Numbers 107,473 and 107,474 as originally filed in The Tax Court of the United States and consolidated for decision purposes by said Court).

Summary and Short Statement of Matters Involved

On December 2, 1937, W. W. Fondren and Ella F. Fondren each made seven separate gifts to each of seven irrevocable trusts. Each of the several trusts had been created for a specifically named grandchild and each gift consisted of 100 shares of Humble Oil & Refining Company stock then of the fair market value of $5,975.00. In preparing and filing their 1937 gift tax returns and paying their respective gift taxes for such year, the respective donors considered the several gifts to be gifts of present interests and accordingly claimed the benefit of the $5,000.00 annual exclusion as to each gift.

Upon his examination of the gift tax returns, the Gift Tax Examiner treated the several gifts as gifts of future interests and therefore disallowed the annual exclusion deductions and assessed deficiency gift taxes on the basis of such disallowance.

Taxpayers thereupon filed their petition with The Tax Court of the United States (then known as The United States Board of Tax Appeals), asking for a redetermination of the deficiency tax on the ground that the several gifts were, in fact, gifts of present interests and the $5,000.00 annual exclusion as to each gift constituted a proper deduction for gift tax purposes.

In due time The Tax Court of the United States promulgated its decision holding that the gifts were gifts of future

interests and denying the annual exclusion deductions. In due time petition for review was filed by taxpayers in The Circuit Court of Appeals for the Fifth Circuit, and under date March 3, 1944, said Circuit Court of Appeals entered its judgment affirming the decision of The Tax Court of the United States.

This petition for Writ of Certiorari has as its purpose the review of this cause by the Supreme Court of the United States and the promulgation by such Court of the sound rule of decision proper to be applied to gifts in trust for the benefit of minors.

Opinions Below

The opinion of The Tax Court of the United States is reported in 1 T.C. 1036, and appears in this record at pages 29-36. The opinion of the Circuit Court of Appeals is reported in 44-1 U. S. T. C., Par. 10096, 141 Fed. (2d) —, appears in this record at pages 72-81.

The opinion of the Circuit Court of Appeals was by JUSTICE MCCORD and was concurred in by JUSTICE SIBLEY with dissenting opinion by CHIEF JUSTICE WALTER.

Jurisdiction of the Court

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended, 28 U.S.C.A. 347(a).

Questions Presented

1. Were the several gifts made in trust by W. W. Fondren and Ella F. Fondren respectively on December 2, 1937, to seven irrevocable trusts each of which trusts was created for the benefit of a specifically named grandchild then in being and of tender years, gifts of future interests to the respective

grandchildren within the meaning of Subdivision (b) of Section 504 of the Revenue Act of 1932 as then effective, where each of the trust indentures expressly provided

a. That the trust was created for the specifically named grandchild,

b. That the purpose of the trust was to provide for the personal comfort, support, maintenance and welfare of the specifically named grandchild,

c. That the specifically named grandchild should be properly maintained, educated and supported, and made it the duty of the trustee to see that this obligation should be properly and reasonably discharged, and for such purpose authorized the use of the entire trust estate both income and corpus?

2. Were the several gifts made in trust by W. W. Fondren and Ella F. Fondren respectively on December 2, 1937, to seven irrevocable trusts each of which trusts was created for the benefit of a specifically named grandchild then in being and of tender years, gifts of present interests to the respective grandchildren within the meaning of Subdivision (b) of Section 504 of the REVENUE ACT of 1932 as then effective, and therefore entitled to the annual exclusions provided in said Revenue Act, where each of the trust indentures expressly provided

a. That the trust was created for the specifically named grandchild,

b. That the purpose of the trust was to provide for the personal comfort, support, maintenance and welfare of the specifically named grandchild.

c. That the specifically named grandchild should be properly maintained, educated and supported, and made it the duty of the trustee to see that this obligation should be properly and reasonably discharged, and for such purpose authorized the use of the entire trust estate, both income and corpus?

Statutes and Regulations Involved

At the time the gifts under consideration were made, the applicable provisions of the REVENUE ACT and REGULATIONS read as follows:

Subdivision (b) of Section 504 of the REVENUE ACT of 1932, read,

> (b) Gifts Less Than $5,000.00.—In the case of gifts (other than future interests in property) made to any person by the donor during the calendar year, the first $5,000.00 of such gifts to such person shall not, for the purposes of Subsection (a), be included in the total amount of gifts made during such year.

Article 11 of REGULATION 79 (1936 Edition), read,

> "Future interests" is a legal term, and includes reversions, remainders, and other interests or estates, whether vested or contingent, and whether or not supported by a particular interest or estate, which are limited to commence in use, possession, or enjoyment at some future date or time.

Reasons for Granting the Writ

First—The decision below, in holding that the gifts under consideration were gifts of future interests, cites as its authority the decisions of this Honorable Court in the cases of UNITED STATES v. PELZER, 312 U.S. 399, and RYERSON v. UNITED STATES, 312 U.S. 405, and stems either from a misunderstanding of the effect of such decisions or from an unwarranted extension of the legal principles announced therein.

Second—The decision below, in holding that the gifts under consideration were gifts of future interests, is in conflict with the following decisions:

(a) The decision of the United States Circuit Court of Appeals for the Eighth Circuit in the case of SMITH v. COMMISSIONER, 131 Fed. (2d) 254.

(b) The decision of the United States Circuit Court of Appeals for the Seventh Circuit in the case of SENSENBRENNER v. COMMISSIONER, 134 Fed. (2d) 883.

(c) The decision of the District Court of the United States for the Northern District of California, Southern Division, in the case of KINNEY v. ANGLIM, 43 Fed. Supp. 431.

Third—The question of whether or not gifts such as those now under consideration are gifts of future interests will most certainly present itself in innumerable cases with the result that litigation and settlement of these many cases will be prolonged unless this Writ of Certiorari is granted and the sound principle of decision authoritatively and finally promulgated. A question of unusual importance in tax law is involved, and both our citizenship and the Treasury Department are entitled to have the question settled by a decision of this Court.

Fourth—The decision below, in holding that the gifts under consideration were gifts of future interests, is intrinsically wrong and will operate to multiply and prolong litigation until the correct rule of decision is announced by this Court.

Wherefore it is respectfully submitted that this Court should grant the Writ of Certiorari to review the decision of

The Circuit Court of Appeals for the Fifth Circuit in Cause No. 10829 below.

E. E. TOWNES,
W. M. CLEAVES,
Attorneys for Petitioners

Of Counsel

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Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Statement of Facts

The seven trust indentures were, for all purposes of the instant case, of identical terms and provisions, saving and excepting only that each indenture named one grandchild as beneficiary thereof.

The following brief references to the provisions of the trust indenture naming Wash Bryan Trammell, Jr., as beneficiary are illustrative of all the trust indentures and form a basis for a correct understanding of the issues in this case.

The opening lines of the indenture read as follows:

> "KNOW ALL MEN BY THESE PRESENTS: that we, W. W. Fondren and his wife, Ella F. Fondren, of the State of Texas and County of Harris, and hereinafter referred to as Grantors, do hereby make, establish, publish, and declare a trust and gift for our Grandson, Wash Bryan Trammell, Jr., the son of our daughter, Sue Fondren Trammell, upon the terms, conditions and with the limitations hereinafter set forth, and for the purposes and objects herein expressed; and in consideration thereof, and in consideration of the love and affection which we bear to our said Grandson, we have granted, assigned, transferred, set apart and conveyed, and by these presents do grant, assign, transfer, set apart and deliver, to W. W. Fondren, as Trustee, and only in his capacity as Trustee, and to his successor and successors as such Trustee, all of the property described in 'Exhibit A' which is hereto attached."

Article One of the trust indenture after authorizing augmentations of the trust estate provided that

> "such additional property so assigned, transferred and delivered shall constitute and immediately be and become part of the trust fund hereby created for the benefit of our said Grandson, and shall be in all things controlled, handled, managed and disposed of in accordance with the provisions of this instrument;"

The first four paragraphs of Article Three of said indenture read as follows:

"Out of the trust estate hereby created and as the same may hereafter be augmented and increased by gift from the Grantors or either of them as herein provided for, or from any other source whatsoever, the Trustee shall provide for the support, maintenance and education of our said Grandson, using only the income of said estate for that purpose if it be sufficient. If it be necessary to use any of the corpus of the estate for that purpose and in the judgment of the Trustee it is best to do so, said Trustee may make advancements out of the corpus of said trust estate for such purpose for the benefit of our said Grandson.

"It is contemplated, however, that our said Grandson will have other adequate and sufficient means of support, and that it will not be necessary to use either the income or the corpus of the trust estate hereby created to properly provide for his education, maintenance and support; and, if the income from the trust estate be not needed for these purposes, then all of the income from said trust estate not so needed shall be by the Trustee passed to capital account of said trust estate, and shall be and become a part of said trust estate, it being our hope that all of the earnings and income of said trust estate during the period of this Trust may be used to augment the trust estate and be delivered to our said Grandson at the periods herein provided for. It is expressly provided, however, that our said Grandson shall be properly maintained, educated and supported, and if it be necessary to use all of the income and even all of the corpus of the trust estate hereby created and all augmentations thereof, it shall be the duty of the Trustee to see that this obligation shall be properly and reasonably discharged.

"This trust shall endure and continue until our said Grandson attains the age of twenty-five years, at which time the Trustee then acting shall deliver to him twenty-five per cent (25%) of said trust estate and its accumulations, if any, and shall retain the remainder thereof until our said Grandson shall attain the age of

thirty years, when the Trustee shall deliver to him thirty-three and one-third per cent (33 1/3%) of the total amount of said estate then in his possession, including also the accumulations thereof; and the remainder of said estate shall be continued thereafter until our Grandson shall reach the age of thirty-five years, at which time all of said trust estate remaining in the hands of the Trustee shall then be delivered to our said Grandson. These deliveries, however, are conditioned upon and subject to the continued life of our said Grandson until each such period is reached.

"If our said Grandson, Wash Bryan Trammell, Jr., shall die leaving issue him surviving, before all of said trust estate shall be delivered to him, the said Wash Bryan Trammell, Jr., then said trust estate then held by the Trustee shall be held and administered by the Trustee for the benefit of such surviving issue of the said Wash Bryan Trammell, Jr., and shall be delivered to such issue, share and share alike, when the youngest of such issue shall attain the age of twenty-one years. If our said Grandson shall die without issue before the trust estate is finally delivered in full to him under the terms hereof, then all of the trust estate in the hands of the Trustee at the time of his death shall be held and administered by the Trustee for the use and benefit of our Granddaughter Sue Trammell, and shall be distributed to her in the same manner, and at the same periods of her age as herein provided for our said Grandson Wash Bryan Trammell, Jr.; and if she, the said Sue Trammell, shall die before said estate is delivered to her by the Trustee under the terms hereof and leave issue her surviving, said estate shall be held and administered by the Trustee for the benefit of such issue, and when the youngest of such issue shall attain the age of twenty-one years said estate shall be delivered to such issue share and share alike. If the said Sue Trammell shall die without issue, however, before the distribution of said trust estate is completed, the amount then in the hands of the Trustee shall descend to and be distributed to her heirs under the laws of the State of Texas."

The first sentence of Article Five of the trust indenture reads as follows:

> "The purpose in creating this trust is to provide for the personal comfort, support, maintenance and welfare of our said Grandson."

The third paragraph of Article Six of the trust indenture reads as follows:

> "Said designation of a new Trustee may be made whenever and as often as the Grantors herein named or the survivor of them shall deem it to the best interests of the trust estate; but it is distinctly understood, however, that this trust is absolutely irrevocable, and the Grantors reserve no rights in themselves to any interest in said trust estate, nor to any income therefrom, nor to any increase thereof, of any kind or character whatsoever, and reserve no control over the same except under the terms of this Trust as Trustees, and reserve to themselves no defeasance of said trust estate under any terms, conditions or circumstances whatsoever; and that whenever W. W. Fondren or Ella F. Fondren is acting as Trustee of said Estate all acts in the control, management and disposition of said estate shall be acts as Trustee and not individually, it being distinctly provided that the Grantors have no individual interest of any kind or character in, to or unto said trust estate, or any part thereof."

The opening lines of the closing paragraph of the trust indenture read as follows:

> "For the protection, education, support and maintenance of our said Grandson we have made and executed this instrument."

At the date of the making of the gifts under consideration

the ages of the several grandchildren beneficiaries were as follows:

> Mary Doris Fondren was seven years of age;
> Ellanor Anne Fondren was five years of age;
> Sue Trammell was four years of age;
> Peter Fondren Underwood was four years of age;
> Walsh Bryan Trammell, Jr., was two years of age;
> Walter William Fondren, III, was one year of age;
> David Milton Underwood was nine months of age.

II.

Argument

***First Proposition*—The decision of the Circuit Court of Appeals for the Fifth Circuit in the instant case is in no proper sense supported by the decision of this Court in either *United States v. Pelzer*, 312 U.S. 399, or *Ryerson v. United States*, 312 U.S. 405.**

In the case of UNITED STATES V. PELZER (supra) the court was considering the nature of certain gifts in trust made during the calendar years 1933, 1934 and 1935. The trust to which the gifts were made was created in 1932 and eight then living grandchildren and all after born grandchildren were designated as beneficiaries. No distributions out of either income or corpus were authorized to be made prior to 1942, and distributions subsequent to such date were to be made ratably among such grandchildren as might be living on the date of the particular distribution. The decision was:

(1) That the eight grandchildren were the persons to whom the gifts were made, and

(2) That since the donees had no "right to the present

> enjoyment of the corpus or of the income and unless they survived the ten-year period they will never receive any part of either" the gifts constituted gifts of future interests.

In the case of RYERSON v. UNITED STATES (supra) two different trusts were involved, one created by trust indenture executed in 1933 and the other by trust indenture executed in 1934.

The 1933 trust indenture provided that the trust estate could be distributed to the two trustees by their own joint action, and also provided for the termination of the trust by one trustee in case of the death or mental incapacity of the other trustee, with the further provision that one-fourth of the net income should be distributed to a named beneficiary so long as she should live, with the remainder over to other designated parties for life. The other three-fourths of the income was to be accumulated; and, in the absence of earlier termination, the entire trust estate was to be finally distributed upon the death of the last survivor of three named parties.

The 1934 trust indenture provided that upon the death of the grantor the trust estate should be distributed in designated ways among those members of a group who might be then living.

The gift to each of these two trusts constituted a single premium insurance policy on the life of the donor with the result that not even the corpus of the trust, let alone any income therefrom, would be available to any beneficiary until after the death of the donor.

The decision was that since

> "all those who might become entitled to the use and enjoyment of the trust, principal and income, were ascertainable only upon the happening of one or more uncertain future events"

the gifts as to all donees constituted gifts of future interests within the meaning of the Federal Gift Tax statute and the Treasury regulations promulgated in conformity thereto.

The statutes and regulations applicable to the instant case are identical with the statutes and regulations as applied in UNITED STATES v. PELZER (supra) and RYERSON v. UNITED STATES (supra); but the facts of the instant case are utterly dissimilar to the facts in these other cases in that here we are dealing with a trust which was created for one specifically named grandchild and it was made the express duty and obligation of the trustee to see that such grandchild was properly protected, educated, supported and maintained.

It is important to note that in UNITED STATES v. PELZER (supra) no right to enjoyment of either corpus or income would ever vest in any beneficiary unless such beneficiary survived the ten-year period, and that in RYERSON v. UNITED STATES (supra) the identity of those who might become entitled to the benefits of the trust depended upon the happening of uncertain future events. It is respectfully submitted that the basic inquiry in these cases should not be what use, possession and enjoyment the beneficiary may ultimately appropriate, but rather what is such beneficiary's vested and fixed right today; and it is apparent that the Circuit Court of Appeals in the instant case has failed to keep in mind this fundamental and controlling difference between actual use and the right to use. The determinative factor should be the existence of the present right or title and not the possibility or extent of actual appropriation.

Second Proposition*—The decision of the Circuit Court of Appeals for the Fifth Circuit in the instant case is in conflict with the decisions in *Smith v. Commissioner*, 131 Fed. (2d) 254; *Sensenbrenner v. Com-

***missioner*, 134 Fed. (2d) 883, and *Kinney v. Anglim*, 43 Fed. Supp. 431.**

In SMITH v. COMMISSIONER (supra), decided by the Circuit Court of Appeals for the Eighth Circuit, one trust had been created for trustor's two grandchildren. The trust indenture provided for final distribution to each grandchild upon his reaching twenty-four years, but contained the following express provisions with reference to earlier distributions:

> "Trustee shall be and is empowered and directed, in his sole discretion, to use the principal and income from said Estate for the purpose of the education and preparation of said beneficiaries to attain and occupy an advantageous and desirable position in life."
>
> "The Trustee is authorized and directed to expend any or all of the principal sum of said Estate, as in his judgment and discretion may be found necessary, for the personal care and maintenance of said beneficiaries herein, and is authorized to provide, furnish and pay for any or all professional or medical services or attendants, during any illness of beneficiaries."

The decision was that the gifts to the grandchildren beneficiaries were gifts of present interests.

In the instant case there is a complete absence of discretionary power on the part of the trustee and the purpose of the Trust to provide a present interest in the beneficiary is most unequivocally expressed.

In SENSENBRENNER v. COMMISSIONER (supra), decided by the Circuit Court of Appeals for the Seventh Circuit, seven trusts had been created for seven grandchildren, the trust indentures providing that during minority of the particular grandchild the income should be paid either to the donor or to another designated party to be used by the distributee for the support, maintenance and education of the

grandchild in such manner as the distributee should in his sole discretion deem best. The decision was that the gift was a gift of a present interest.

How much stronger are the facts in the instant case where, in lieu of making the benefit to the grandchild depend on the uncontrolled discretion of the donor or a third party, as in the SENSENBRENNER case, the trust indenture makes it the express duty of the trustee to apply both corpus and income to the proper comfort and welfare of the specifically named grandchild beneficiary.

In KINNEY v. ANGLIM (supra), decided by the District Court of the United States for the Northern District of California, the trust had been created for trustor's three granddaughters with provision for final distributions when the granddaughters should attain the ages of twenty-one and thirty years. The income to the trust was to be paid to the mother of the particular granddaughter until the latter should reach the age of twenty-one years. The decision was that the gifts to the three granddaughters were gifts of present interests notwithstanding that during minority distributions were to be made to the mother and not to the granddaughter.

In the instant case there is no question either as to the purpose of the trust or as to the identity of the party to whom and for whose benefit distributions are to be made, and no discretionary power is vested in the trustee.

In connection with this matter of conflict with other cases, it is important to keep in mind that the opinion of the Circuit Court of Appeals in the instant case was by a divided court and that, in a most vigorous dissenting opinion, CHIEF JUSTICE WALLER specifically pointed out the substantial weakness of the majority opinion and effectively differentiated all cases cited by JUSTICE MCCORD as supporting his majority opinion.

***Third Proposition*—The instant case involves a question of unusual importance in tax law and unless and until the sound principle of decision is established by this Court much unnecessary and prolonged litigation will occur,**

Throughout the entire history of American jurisprudence trusts for minor beneficiaries have both received and merited most cordial and sympathetic consideration; and the creation of such a trust has been recognized as a most laudable and praiseworthy act. In few undertakings has one been permitted more unalloyed satisfaction than to thus assure to some small child those things that make for a strong body, a trained mind and an unfettered spirit. As a result of this attitude thousands upon thousands of such trusts have been created, some before the incidence of the gift tax statute and some subsequent to the passage of the gift tax law, but all having as their dominant purpose the present and or future welfare of the object of the beneficence.

In the preparation of trust indentures unusual care is exercised to clearly set forth both the purposes of the particular trust and the safeguards which are considered proper for the reasonable protection of the trust estate, but on account of diversity of authorship the phraseology of each particular instrument is more or less unique and distinctive. It therefore follows that in the absence of some established rule of decision as to the question now under consideration, no one, be he layman or counsellor, can speak with assurance.

The instant case offers an admirable basis for an examination into the legal principles which apply to gifts in trust for minor beneficiaries, and also for the promulgation by this Court of the sound rule of decision in a case where the immediate and continuous protection of the minor beneficiary is the dominant and controlling purpose of the trust

and the trustee is vested with no discretionary power within the proper meaning of the said term as applicable to trust indentures. It is therefore most earnestly submitted that the reexamination by this Court of the decision in this case as announced by the Circuit Court of Appeals for the Fifth Circuit is, from the standpoint of our general jurisprudence, greatly to be desired, and will have as its result, not only the clarification of the rule of decision, but also the avoidance of much unnecessary and prolonged litigation.

***Fourth Proposition*—The decision of the Circuit Court of Appeals for the Fifth Circuit is intrinsically wrong and will operate to multiply and prolong litigation until the correct rule of decision is announced by this Court.**

Each of the trusts under consideration was unqualifiedly irrevocable and with no defeasance, reversion or other benefit retained by the donor. Each specifically named grandchild was given the largest use, possession and enjoyment possible to be sensibly given to a child of tender years, and the donation was made in the most approved method, indeed, the only practicable method in the absence of resort to legal guardianship with its attendant expense and inconvenience.

The gifts, immediately they were made, were presently available for the needs of the respective grandchildren, with no power or discretion vested in the Trustee or any other party to deny or withhold the use, possession or enjoyment by the beneficiary; and to hold these gifts to be gifts of future interests is in effect to hold that no gift in trust of a present interest can be made to a minor beneficiary, if the trust indenture contains those ordinary provisions which human experience has shown are necessary to insure the proper and reasonable protection of the trust estate. It is submitted that such a discrimination against trusts for minor

beneficiaries was never intended by Congress, is entirely unwarranted and out of harmony with all fundamental principles of taxation and trust law, and should not be indulged.

Respectfully submitted,

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